Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

No. 94-743 (2)

In The
Supreme Court Of The United States
October Term, 1994

THE ASSOCIATION FOR RETARDED CITIZENS OF CONNECTICUT, INC., ET AL.
Petitioner,

v.

GARETH THORNE, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION

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21pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... (i)

TABLE OF AUTHORITIES ..... (ii)

STATEMENT OF THE CASE 2

ARGUMENT 5

THE ISSUES PRESENTED IN THIS CASE DO NOT WARRANT THIS COURT'S REVIEW. 5

A. The Decision of the Court of Appeals Is Not In Conflict With Decisions Of This And Other Courts And Has Little Application Outside Of The Unique Facts Of This Case. 5

B. The Petitioners' Claims That The Public Interest Requires Reversal Are Based On Misstatements Of The Record And A Mischaracterization Of The Holding Of The Court Of Appeals. 10

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: **Page**

Alberti v. Sheriff of Harris County, Tex., 937 F.2d. 984 (5th Cir. 1991) 8n, 9

Association For Retarded Citizens of Connecticut v. Thorne, 30 F.3d 367 (2d Cir. 1994) ..... *passim*

Badgley v. Varelas, 729 F.2d 894 (2d Cir. 1984) 8n, 9

Benjamin v. Malcolm, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 480 U.S. 910 (1987) 8n, 9

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 9

Martin v. Wilks, 490 U.S. 755 (1989) 7n, 9

New York State Association For Retarded Children, Inc. v. Carey, 466 F.Supp. 479 (E.D.N.Y. 1978) 12, 14

New York State Association For Retarded Citizens, Inc. v. Carey, 706 F.2d 956 (2d Cir. 1983) 13

New York State Association For Retarded Citizens, Inc. v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973) 13

Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34 (1985) 8

Richard Messier, et al v. Southbury Training School et al, United States District Court, District of Connecticut, No. 3:94CV01706 (AVC) (filed October 6, 1994) 15n

United States v. IBT, 968 F.2d 1472 (2d Cir. 1992) 9

United States v. IBT, 968 F.2d 1506 (2d Cir. 1992) 9

Youngberg v. Romeo, 457 U.S. 307 (1981) 12

STATUTES

28 U.S.C. § 1343 (a)(3) 10

28 U.S.C. § 1367 (a) 10

28 U.S.C. § 1651 ..... 2, 5

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19 ..... 8, 15, 16, 16n

Rule 20 ..... 8, 15, 16, 16n

Rule 21 15

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STATEMENT OF THE CASE

The petitioners Association for Retarded Citizens of Connecticut et al have brought a petition for a writ of certiorari asking this Court to review the judgment of the Court of Appeals of the Second Circuit in *Association For Retarded Citizens of Connecticut v. Thorne*, 30 F.3d 367 (1994)(reproduced in Petitioners Appendix at 1A). This decision held that the district court's decision to join the respondent Department of Public Health and Addiction Services (formerly known as the Department of Health Services) pursuant to the All Writs Act, 28 U.S.C. § 1651, was improper. The Court held that the district court should not have ordered joinder of the respondent in order to implement a consensual final order voluntarily entered into by other parties three years earlier which the respondent had neither bargained for nor agreed to.[1/]

The underlying litigation is a class action brought in 1978 by mentally retarded individuals and the Connecticut Association For Retarded Citizens challenging the care and placement of mentally retarded persons at the Mansfield Training School. The named defendants included the respondent Department of Health Services

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1/ The respondent does not address petitioners' misstatements of the record regarding the underlying issues surrounding Do Not Resuscitate orders as the Court of Appeals did not reach these issues and other grounds of error raised in the appeal of the district court decision.

(DHS) and the Department of Mental Retardation (DMR). Petit. App. at 4A, 30 F.3d at 368.

In 1982, the respondent DHS was dismissed from the case on the ground that "it was not essential to the Court's resolving the disputed issues in the litigation." *Id.* In 1984, the magistrate judge to whom the case had been referred by the district court approved a consent degree entered into by the remaining parties. *Id.*

In November of 1990, the magistrate judge with the agreement of the parties, issued a final order which included portions of the consent decree, additional settlement agreements entered into by the parties after the decree, and some new provisions. Petit. App. at 4A-5A, 30 F.3d at 369. One of these provisions required DMR to implement an advisory regarding Do Not Resuscitate Orders which it had adopted in 1987. The advisory sets guidelines for such orders for DMR clients who reside in a facility operated or licensed by DMR. *Id.*

In July of 1992, petitioners filed a motion to join DHS as a defendant and for a preliminary injunction requiring DHS to implement the advisory in all DHS licensed health care facilities. Petit. App. at 6A, 30 F.3d at 369. On February 12, 1993, the magistrate judge granted petitioners' motion in a recommended ruling to the district court. The magistrate judge joined DHS as a party under the All Writs Act because it was in a position to frustrate the implementation of the final order's provision on the advisory. *Id.* The magistrate judge also recommended that a preliminary injunction be issued to

require DHS to implement the advisory because DHS had violated the final order and the classmembers' rights to life. *Id.*

On August 26, 1993, the district court adopted and affirmed the magistrate judge's recommended ruling without significant change despite the objections of DHS. *Id.* DHS subsequently appealed to the Court of Appeals of the Second Circuit.

On July 25, 1994, the Court of Appeals reversed the district court decision. The Court found that the use of the All Writs Act to impose the voluntarily assumed settlement of the parties upon DHS was improper. The Court did not reach the underlying issues surrounding Do Not Resuscitate orders as well as other grounds of error raised by DHS. Petitioners subsequently filed a petition for a writ of certiorari to have this Court review the Court of Appeals decision.

ARGUMENT

THE ISSUES PRESENTED IN THIS CASE DO NOT WARRANT THIS COURT'S REVIEW.

A. The Decision of the Court of Appeals Is Not In Conflict With Decisions Of This And Other Courts And Has Little Application Outside Of The Unique Facts Of This Case.

The petitioners have failed to establish that there are special and important reasons for the grant of a writ of certiorari in this case. Petitioners have not identified a single decision of this Court, of another Court of Appeals or of a state court of last resort which is in conflict with the ruling below by the Second Circuit Court of Appeals. Nor have the petitioners established that the Court of Appeals ruling was such a departure from the accepted and usual precedent that the exercise of the Supreme Court's power of supervision is required. On the contrary, the Court of Appeals pointed out that its ruling was consistent with **eight** prior decisions of the Second Circuit which considered the use of the All Writs Act, 28 U.S.C. § 1651. Petitioners fail to discuss any of these precedents.

Nor can petitioners establish that the ruling below will have a wide effect on the application of All Writs Act outside of the unique factual setting of the case. The Court of Appeals' ruling that use of the All Writs Act was inappropriate was based on a number of

facts in the unusual and protracted history of the underlying litigation.

The facts of this case are unique. When this litigation began in 1978, the defendant Department of Health Services (DHS) was a named defendant. Petit. App. at 4A, 30 F.3d at 368. In 1982, the district court granted DHS' motion to be dismissed from the suit on the ground that it was not "essential to the Court's resolving the disputed issues in the litigation." *Id.* Petitioners never challenged this order. In 1984, the remaining parties entered into a consent decree resolving the case without adjudication of any of the issues on the merits. Petit. App. at 4A-5A, 30 F.3d at 368. In 1990, these parties agreed to the entry of a final consensual order reflecting a panoply of settlement agreements, the consent decree and some additional terms including one provision addressing Do Not Resuscitate orders for classmembers in DMR licensed or operated facilities. Petit. App. at 5A, 30 F.3d at 369. The final consensual order was entered without the knowledge or participation of DHS and none of its terms or components rested on a court adjudication of constitutional or statutory violations. In 1993, nearly three years after the entry of this final order and a *decade* after DHS was dismissed from the case, the district court joined DHS as a defendant under the All Writs Act in order to require it to abide by one of the terms of the parties' agreement. Petit. App. at 6A, 30 F.3d at 369. These

facts, peculiar to this case, were crucial to the Court of Appeals' ruling.

The Court of Appeals found that the joinder of DHS in order to require its compliance with the terms of an agreement to which it was not a party, rather than with orders of a court, was improper. Petit. App. at 8A-9A, 30 F.3d at 370. The holding was dependent on the specific fact that the consent decree and its successor, the final order, was entered into voluntarily without any adjudication of the rights or liabilities of the parties. This distinction was critical to the Court's analysis. *Id.* The Court found, based on numerous precedents, that the district court was without authority to extend the consensual final order to DHS, a party that did not bargain for it or agree to it, simply on the ground that DHS' compliance would assist the parties to implement their settlement.[2/]

> Where the district court exercises its jurisdiction to rule that on the merits of a litigation, it determines that the law requires a certain outcome and is empowered to issue remedial orders to effectuate that outcome. By power of the All Writs Act, it may require the compliance of nonparties in order to ensure that its legally-mandated directives are not frustrated. *In contrast, where a district court enters a privately-negotiated consent decree,*

2/ This conclusion is consistent with the precedent of this Court. *See Martin v. Wilks*, 490 U.S. 755, 761-62 (1989)("A judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings.").

> *it does not determine the obligations assumed by the parties are required by law. Indeed, consent decrees often impose rights and obligations greater than those required by law.* Because the terms of the consent decree were voluntarily assumed rather than legally imposed, there is no basis for extending the negotiated outcome to a nonparty.

Id. (citation omitted) (emphasis added).[3/]

In addition, the fact that DHS had once been a party but had been dismissed by the lower court eleven years earlier as nonessential to resolution of the case, led to the Court's statement in *dicta*, that while the district court had not considered joinder under Rules 19 and 20 of the Federal Rules of Civil Procedure, "[w]e have serious doubts that Rules 19 and 20 would have permitted DHS' joinder..." Petit. App. at 9A, 30 F.3d at 370. Consistent with this Court's caselaw, the Second Circuit noted that the All Writs Act does not authorize ad hoc writs in order to avoid use of existing procedures, including those provided in Rules 19 and 20. Petit. App. at 9A-10A, 30 F.3d at 371. *See Pennsylvania*

3/ This holding was supported in part by the comparison of the present case to the Second Circuit's prior decisions in *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984) and *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 480 U.S. 910 (1987). Petit. App. at 10A-12A, 30 F.3d at 371. Both of these cases involved the imposition of consent decrees upon nonparties. The Second Circuit's analysis of these two cases was foretold by the Fifth Circuit in *Alberti v. Sheriff of Harris County, Tex.*, 937 F.2d. 984, 996 (5th Cir. 1991).

Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 43 (1985). Moreover, the fact that DHS had been dismissed from the litigation by order of the district court in 1982 was the basis for the Court's rejection of petitioners' argument that DHS' interests could be considered to have been represented by the parties to the consent decree. Petit. App. at 13A, 30 F.3d at 372.

This ruling, predicated on the unique facts of the case, is consistent with the rulings of this Court and other rulings by the Second Circuit. *See e.g. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 575 (1984); *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984); *United States v. IBT*, 968 F.2d 1506, 1512 (2d Cir. 1992); *United States v. IBT*, 968 F.2d 1472, 1477 (2d Cir. 1992). *See also Alberti v. Sheriff of Harris County, Tex.*, 937 F.2d. 984, 996 (5th Cir. 1991). The petitioner has identified no case whose holding conflicts with the ruling below.

Further, the fact driven nature of the ruling, based as it is on the unique history of the case, assures that its application outside of this context will be limited. Consequently, the issues presented in this case are such that they do not warrant this Court's review.

B. The Petitioners' Claims That The Public Interest Requires Reversal Are Based On Misstatements Of The Record And A Mischaracterization Of The Holding Of The Court Of Appeals.

Petitioners assert that the "public interest" in institutional reform litigation requires the exercise of this Court's jurisdiction. This argument, however, is predicated on misstatements of the record and mischaracterization of the holding of the Court of Appeals and is insufficient to support the grant of a writ of certorari.

In order to sustain their assertion of an adverse impact on the public interest, petitioners mischaracterize the district court's ruling, prior caselaw, and the effect of the Second Circuit's decision. Although the district court based its order on the authority of the All Writs Act, and it was this ground that was argued to the Second Circuit, the petitioners *for the first time* argue that the district court's jurisdiction was established under the Judicial Improvement Act of 1990, 28 U.S.C. § 1367 (a). Petition at 22-25. This statute was never previously raised by petitioners or considered by any court in this case.

Further, petitioners mistakenly state that the district court first found that DHS had violated the constitutional rights of classmembers and upon that basis, it had jurisdiction to join DHS under 28 U.S.C. § 1367 (a) and 28 U.S.C. § 1343 (a)(3). Petition at 23. A review of the district court decision reveals the falsity of both of

these assertions. The district court unequivocally and exclusively relied upon the All Writs Act to join DHS. Petit. App. at 38A-42A; Petit. App. at 7A, 9A-10A, 30 F.3d at 369, 370-71. In addition, only *after* the district court found that it had jurisdiction under the All Writs Act to join DHS did the court even address the question of "whether the plaintiffs are entitled to the relief they seek." Petit. App. at 43A.[4/]

Petitioners argument that the standards for joinder under Rule 19 of the Federal Rules of Civil Procedure are satisfied is based entirely on their false representation of the district court's findings. Petitioners falsely claim that the district court found "that implementation of the consent decree and protection of classmembers constitutional rights is impossible unless DHS is joined." Petition at 24. This is simply untrue. To the contrary, the district court never evaluated or made a finding regarding the authority or the ability of DMR to implement the consent decree without joinder of DHS. Rather, the district court merely accepted on its face DMR's unsupported claims that it was powerless to enforce the final order in facilities licensed by DHS. Petit. App. at 41A, 47A-48A. As petitioners know, this

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4/ Petitioners' bootstrap argument that the district court could adjudicate the merits of the petitioners' claims and thereafter establish jurisdiction over DHS was rejected by the Court of Appeals. Petit. App. at 11A, 30 F.3d at 371.

omission has been one of the grounds of error raised repeatedly by DHS.[5/]

Petitioners further mischaracterize the district court's ruling that DHS violated classmembers' rights to life by casting this finding as made under the due process standards set forth in *Youngberg v. Romeo*, 457 U.S. 307 (1981). Petition at 23. However, the district court made no citation or mention of the *Youngberg* standards in its decision and ironically, this failure has been one of the objections maintained by DHS throughout the judicial review process to the district court and Court of Appeals.

In addition to misstating the findings of the district court, petitioners confuse the caselaw upon which their petition is based. Petitioners rely heavily upon a district court decision in *New York State Association For Retarded Children, Inc. v. Carey*, 466 F.Supp. 479 (E.D.N.Y. 1978) (hereinafter *Carey*).[6/] In *Carey*, a

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5/ Petitioners also falsely suggest that DHS opposed the consent decree and actively sought to undermine its implementation. Petition at 27. The district court found only that DHS was *in a position to frustrate* the final consensual order, not that it had actively opposed it. Not only did the district court make no such finding, but there was no evidence that would have supported such a finding. Petit. App. at 41A.

6/ Petitioners erroneously cite this decision as affirmed by the Second Circuit Court of Appeals. Petition at 19. The Court of Appeals did not review this ruling, rather the subsequent rejection by the district court of the remedy proposed by the

(footnote cont'd)

class action brought by residents of Willowbrook Developmental Center against state officials had been resolved by a consent judgment *after an adjudication on the merits* which concluded that the rights of classmembers had been violated. *See New York State Association For Retarded Citizens, Inc. v. Carey*, 706 F.2d 956, 958 (2d Cir. 1983); *New York State Association For Retarded Citizens, Inc. v. Rockefeller*, 357 F.Supp. 752 (E.D.N.Y. 1973) (violations of classmembers' rights under Eighth and Fourteenth Amendment supported grant of preliminary injunction). The consent judgment required that state officials take all steps necessary to secure compliance with the consent judgment which included requirements for appropriate services in the community. In order to fulfill this responsibility, and under the standing provided by the consent judgment, the Commissioner of the Office of Mental Retardation and Developmental Disabilities brought an action on behalf of a group of Willowbrook classmembers against a city board of education which had excluded them from local schools because they were hepatitis B carriers 466 F. Supp. at 481-82. The district court determined that the Commissioner's action was ancillary to the underlying Willowbrook class action. In addition, a *new* class

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(footnote cont'd from previous page)

defendant was affirmed. *See New York State Association for Retarded Children, Inc. v. Carey*, 466 F.Supp. 487 (E.D.N.Y. 1979) *aff'd*, 612 F.2d 644 (2d Cir. 1979).

action was brought against the city board of education by a class composed of those Willowbrook classmembers *and others* who had been excluded based upon their hepatitis B status. This class action was certified and consolidated with the ancillary proceeding brought by the Commissioner. *Id.* at 482.

Petitioners' reliance on *Carey* is misplaced on its face. First, in marked contrast to this case, the *Carey* court did not rely upon the All Writs Act for jurisdiction. Rather two independent actions were brought against the defendant board of education. The consolidation of these actions is not equivalent to the district court's joinder of DHS here. Further, in *Carey*, there had been an adjudication of the classmembers' claims on the merits which led to the entry of the consent judgment, whereas, in this case there was not. This is the very distinction the Court of Appeals made in determining that joinder was inappropriate in this case.

Finally, petitioners make several unsupported claims regarding the effect of the Second Circuit's ruling. Petitioners' assertion that classmembers' rights cannot be protected unless they are able to join nonparties to compel their obedience to their settlement is specious. Petitioners repeatedly raise the specter that classmembers will be left unprotected from government agencies that are not parties to consent decrees. As the Court of Appeals noted, its decision does nothing to foreclose future litigation of the underlying issues in this case. Petit. App. at 15A, 30 F.3d at

373. However, the Court held that "DHS is entitled to defend the propriety of its actions in an independent suit where it is not prejudiced by the presence of extraneous claims or parties and an unrelated litigation history." Petit. App. at 11A, 30 F.3d at 371. If DHS has violated classmembers' constitutional rights, nothing prevents classmembers from bringing a direct action against DHS. 7/

In addition, petitioners' claim that the ruling below leaves district courts powerless to join parties under Rules 19, 20 and 21 of the Federal Rules of Civil Procedure whenever their conduct thwarts implementation of a consent decree and violates the constitutional rights of persons protected by the decree is a misstatement of the Circuit Court's ruling. Petition at 13-14. In direct contrast to the petitioners' claim, the Second Circuit decision actually admonished district courts to

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7/ The petitioner organization, Association For Retarded Citizens of Connecticut, Inc., has recently brought a class action regarding Connecticut's sole remaining large institution for the mentally retarded which named DHS as a defendant. The action brought by petitioners' counsel includes allegations regarding improper Do Not Resuscitate orders similar to those presented in this case. *See Richard Messier, et al v. Southbury Training School et al,* United States District Court, District of Connecticut, No. 3:94CV01706 (AVC) (filed October 6, 1994).

use Rules 19 and 20 to resolve joinder issues.[8/] Petit. App. at 9A-10A, 30 F.3d at 370-71.

Petitioners' speculation that the decision of the Court of Appeals will discourage the use of consent decrees is unfounded. It merely makes clear that when a negotiated resolution of a case occurs without any adjudication of the merits, parties may not expect that their voluntary settlements will be forced upon others. The decision may discourage plaintiffs who sit idly by when a defendant is dismissed from a case and then, ten years later, attempt to impose settlements they have negotiated with other parties upon the former defendant. This result scarcely supports petitioners' allegation that the Court of Appeals ruling undermines the "public interest" in institutional reform litigation.

8/ The Court of Appeals' statement that it had "doubts" that joinder would be permitted under Rules 19 and 20 in the particular circumstances of this case is insufficient to support petitioners' conjecture that the ruling leaves district courts powerless to use these rules. Petit. App. at 9A, 30 F.3d at 370.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to review the decision of the Court of Appeals of the Second Circuit in this matter should be denied.

Respectfully submitted,

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